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Cause No. PD-0469-19

In the Court of Criminal Appeals
for
The State of Texas

Ex parte Nathan Sanders

Arising from Cause No.07-18-00335-CR
in the Seventh Court of Appeals in
Amarillo, Texas

Petitioner's Brief

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Oral Argument is Requested.

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Table of Contents

Index of Authorities

CASES

STATUTES

OTHER AUTHORITIES

To the honorable judges of the Court of Criminal Appeals for the State of Texas:

Statement Regarding Oral Argument

The Court has denied oral argument. Petitioner hopes the court will reconsider, as the issue is one of great and far-reaching importance to the jurisprudence of the State.

Statement of the Case

This is a First Amendment challenge to a content-based restriction on speech, section 42.07(a)(7) of the Texas Penal Code. The Seventh Court of Appeals held that repeated electronic communications, made with "intent to inflict emotional distress for its own sake" are not protected speech because they invade the substantial privacy interests of the victim in an essentially intolerable manner, and overruled Mr. Sanders's facial challenge to the constitutionality of Texas Penal Code § 42.07(a)(7).

Statement of Procedural History

Filing in the trial court:	Application for a Writ of Habeas Corpus under Tex. Code Crim. Proc. 11.09, challenging the constitutionality of a statute on June 13, 2018.
Disposition by the trial court:	The application was denied on August 20, 2018.

Disposition by the Court of Appeals:	The Seventh Court of Appeals, in an unpublished opinion issued on September 7, 2018, affirmed the denial. Chief Justice Quinn concurred in the result, but wrote in a footnote of Presiding Judge Keller's reservations concerning *Scott v. State*, 322 S.W.3d 622, 669-70 (Tex. Crim. App. 2010) and its continued correctness.
Grant of discretionary review by this Court:	This Court granted discretionary review on the only ground raised, which is whether Texas Penal Code § 42.07(a)(7) is a content-based restriction that restricts a real and substantial amount of speech as protected by the First Amendment, speech which invades privacy interests of the listener has never been held by the United States Supreme Court to be a category of unprotected speech.

Statement of Facts

Because this is a facial challenge to the constitutionality of a statute, the specific facts of the case are irrelevant to this Court's disposition.

Summary of the Argument

Texas Penal Code § 42.07(a)(7) is an impermissible content-based restriction on speech because it does not fit within a category of

historically unprotected speech as defined by the United States Supreme Court. Lower courts do not possess the authority to declare a new category of unprotected speech. The argument that speech which invades substantial privacy interests in an essentially intolerable manner may be validly prohibited is based on a misreading of relevant United States Supreme Court caselaw and should be rejected.

Furthermore, even if this Court believes that section 42.07(a)(7) does not restrict a *real and substantial* amount of protected speech, the statute nevertheless fails the required strict scrutiny analysis because the statute is not narrowly tailored to achieving a significant governmental interest in protecting the privacy of citizens.

In either eventuality, the statute is unconstitutional on its face and must be struck down *ab initio.*

Argument & Authorities

The Seventh Court of Appeals, in the opinion below, held that repeated electronic communications, made with the "intent to inflict emotional distress for its own sake" were not protected speech under the First

Amendment because they "invade the substantial privacy interests of the victim 'in an essentially intolerable manner.'" [1]

Chief Justice Quinn, concurring in the result, invited this Court, based on Presiding Judge Keller's dissent in *Scott*, this Court's opinion in *Wilson v. State*,[2] and the concurrences of Presiding Judge Keller and Judge Johnson in *Wilson*, to reconsider the majority opinion in *Scott*. The time has come to do exactly that, and this Court should take Chief Justice Quinn's invitation and finally overrule *Scott*.

THE FIRST STEP IN OVERBREADTH ANALYSIS IS TO CONSTRUE THE CHALLENGED STATUTE....

"[I]t is impossible to determine whether a statute reaches too far without first knowing what the statute covers."[3]

The statute at issue, section 42.07(a)(7) of the Texas Penal Code, provides:

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[1] *Ex parte Sanders*, No. 07-18-00335-CR, 2019 WL 1576076 (Tex. App.—Amarillo, April 8, 2019), quoting *Scott v. State*, 322 S.W.3d 622, 670 (Tex. Crim. App. 2010), *abrogated by Wilson v. State*, 448 S.W.3d 418 (Tex. Crim. App. 2014).

[2] *Wilson v. State*, 448 S.W.3d 418 (Tex. Crim. App. 2010).

[3] United States v. Williams, 553 U.S. 285, 293 (2008).

> Sec. 42.07. HARASSMENT. (a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person:
> …
> (7) sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.
> …
> (b) In this section:
> (1) "Electronic communication" means a transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system. The term includes:
> (A) a communication initiated through the use of electronic mail, instant message, network call, a cellular or other type of telephone, a computer, a camera, text message, a social media platform or application, an Internet website, any other Internet-based communication tool, or facsimile machine; and
> (B) a communication made to a pager.[4]

"What the statute covers" is, ultimately, what the statute means to a finder of fact—a jury, naive in the ways of statutory construction—receiving the jury instructions.

Jury instructions providing judicial definitions for common terms are not required, and may constitute an improper comment on the weight

[4] Tex. Pen. Code Ann. § 42.07(a)(7).

of the evidence.[5] So the factfinder will not be bound by any narrowing gloss by a court.

In that light, this statute has several salient features not previously recognized by this Court.

The statute has no sole-intent requirement.

While this Court has stated, without supporting citation, that "in the usual case, persons whose conduct violates § 42.07(a)(4) … will have only the intent to inflict emotional distress for its own sake,"[6] there is nothing in the statute limiting its application to this "usual" case—which is in fact probably quite unusual, since human beings are complex, and their motivations are usually complicated.[7] Even if the intent to cause one of these mild emotional effects were not *usually* coupled with some other intent, it would *often* be. To arrest, charge, prosecute, convict, and jail a person under section 42.07(a)(7) the State need not

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[5] See *Kirsch v. State*, 357 S.W.3d 645, 651 (Tex. Crim. App. 2012).

[6] *Scott v. State*, 322 S.W.3d at 670.

[7] Here, for example, did Mr. Sanders intend *only* to "harass, annoy, alarm, abuse, torment, embarrass, or offend" the complainant, Clerk's Record ("CR") 12, or did he intend *also* to get her attention or even to awkwardly woo her? *See* CR–11 (police report, describing Mr. Sanders's alleged conduct).

prove or even allege that it was his sole intent to embarrass the complainant.

The Statute attempts to protect people against a wide range of mild emotional effects.

The statute is not limited to speech that is intended to harass.[8] Speech that is intended to "annoy,"[9] "alarm,"[10] "abuse,"[11] torment[12] "embarrass,"[13] or "offend,"[14] is punishable under the statute.

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[8] "To irritate or torment persistently." *Harass*, American Heritage Dictionary (4th ed. 2006).

[9] "To cause slight irritation to (another) by troublesome, often repeated acts." *Annoy*, American Heritage Dictionary (4th ed. 2006).

[10] "To give warning to," among other common definitions. Alarm, American Heritage Dictionary (4th ed. 2006). In judging the overbreadth of this statute, this Court should consider the broadest common meanings of its undefined terms, because the sweep of the statute is bounded only by those broad common meanings.

[11] "To assail with contemptuous, coarse, or insulting words; revile," among other common definitions. *Abuse*, American Heritage Dictionary (4th ed. 2006).

[12] "To annoy, pester or harass," among other common definitions. *Torment*, American Heritage Dictionary (4th ed. 2006).

[13] "To cause to feel self-conscious or ill at ease; disconcert: *Meeting adults embarrassed the shy child*." *Embarrass*, American Heritage Dictionary (4th ed. 2006).

[14] "To cause displeasure, anger, resentment, or wounded feelings in." *Offend*, American Heritage Dictionary (4th ed. 2006).

In *Scott* this Court implied that these mental states, comprising the difference between lawful speech and speech that violates section 42.07, are *essentially intolerable*. To the contrary, these states are, in their broad common meanings, largely an ordinary tolerable and tolerated part of life in a free nation. We get embarrassed, and we seek no recourse against our embarrassers. We are offended, and don't seek to prosecute those who have offended us. We are annoyed, and we brush it off.

In fact, we use "annoyance" to describe life's little inconveniences as other than intolerable: *It's just an annoyance.*

The statute does not limit itself to any particular form of communication.

"Electronic communication" covers all modern forms of communication, including telephone calls. Section 42.07(a)(7)'s repeated *electronic* communications encompass section 42.07(a)(4)'s repeated *telephone* communications.

The statute does not require that the communications be sent to the complainant.

Section 42.07(a)(7) requires only that repeated electronic communications be sent in a manner likely to cause one of those low-

intensity forms of emotional harm to *someone*, with the intent to cause that emotional harm to *someone*.[15]

Nor does the statute limit itself to communications that invade anyone's substantial privacy.

Even if a communication *is* made to the complainant, it may be made on Twitter, Facebook, Instagram, or some other publicly viewable social-media platform—or by telephone or email to a government telephone number or email address.[16]

The statute does not require that the complainant actually suffer the intended emotional harm.

The complainant need not even know about the communications, provided that the communications were *intended* to embarrass her and *reasonably likely* to do so.[17]

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[15] For example, if a lawyer sends two emails to a reporter describing misconduct by the District Attorney, the lawyer's speech—intended to embarrass the D.A., and reasonably likely to do so—violates section 42.07.

[16] In a case pending in the Fourteenth Court of Appeals, the alleged speech is multiple calls to the Houston Police Department's Auto Theft Division with the intent to get the Division to act on a stolen-vehicle report. *Ex parte Charles W. Jones*, No. 14-19-00248-CR.

[17] Imagine three people: B(ystander), C(omplainant), and D(efendant). D addresses two tweets to C, intending to offend him. These tweets are reasonably likely to offend C. But after D sends the tweets and before C reads them, C wisely deletes his Twitter account. D has nonetheless violated section 42.07(a)(7), and may be prosecuted if B

THE TIME TO REVIEW *SCOTT* HAS ARRIVED.

The majority opinion in *Scott* continues to be a thorn embedded in the side of this Court's First Amendment jurisprudence. The majority opinion in *Scott* created, *ex nihilo*, a new category of unprotected speech: speech which, for purposes of inflicting emotional distress, invades substantial privacy interests. Although the *Scott* majority concerned itself with the telephonic, rather than electronic, harassment provisions, the rationale is the same.[18]

THE GENESIS OF THE COHEN *DICTA DOES NOT SUPPORT THE CREATION OF A NEW CATEGORY OF UNPROTECTED SPEECH.*

This Court adopted dicta from *Cohen v. California* to justify restricting otherwise-protected speech. Procedurally, this cannot stand. First, the ultimate holding in *Cohen* was that a jacket laced with profanity *did not justify* a content-based restriction on speech, even if persons outside the

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complains to law enforcement about the tweets. In fact, because section 42.07(a)(7) doesn't require the person whom D intended to offend to be the person whom D was reasonably likely to offend, B could complain to law enforcement that the tweets, intended to offend C, were reasonably likely to offend B himself.

[18] *Scott v. State*, 322 S.W.3d at 670, citing *Cohen v. California*, 403 U.S. 15, 21 (1971) (stating, in dicta, that a state may lawfully proscribe communicative conduct that invades the substantial privacy interests of another in an essentially intolerable manner).

home had not consented to viewing such profanity.[19] The *essentially intolerable invasions of privacy* language was thus true dicta. A case that holds that some speech is protected cannot be used as authority that some other speech, discussed in *dicta*, is not.

Second, the *Cohen* Court did not define what "substantial privacy interests" are or what manners may invade them that are not "essentially intolerable."[20] Even within the opinion, the Court was careful to establish that a "broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections."[21]

This Court's rationale for adopting *Cohen*'s dicta was that a person's own home is more private than the public square in *Cohen*; while axiomatically true, we do not ban speech simply because it would be unwelcome within certain homes based on predilections of the

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[19] *Cohen v. California*, 403 U.S. at 21.

[20] *Id*. Even under *Scott*'s reasoning, the State must argue that "annoyance," "embarrasment," and "offense" are "essentially intolerable." Texans are made of sterner stuff than that. By analogy to *Miller v. California*, if the State is going to try to punish speech because it is essentially intolerable, the issue of essential intolerableness should be an issue for the trier of fact. *Miller v. California*, 413 U.S. 15, 24 (1973).

[21] *Cohen v. California*, 403 U.S. at 21.

homeowners. While it may be true that the local Baptist minister, sitting in his parsonage, would not welcome a subscription to *Playboy*, we do not exercise prior restraint against *Playboy*'s publisher because a copy of the magazine might be mailed to the parsonage.

However, under this Court's prior interpretation of section 42.07, a person who sends two e-mails containing links to *Playboy* articles to the minister would be guilty of a crime, even though there is nothing in the articles which would justify censorship, simply because the effect on the minister was to upset him.

This brings us to the point that must be confronted by this Court: does a listener's emotional reaction to an otherwise-lawful communication render it such that the government can prohibit the communication?

Subsequent judicial decisions require a re-evaluation of Scott.

Mr. Sanders is the latest in a long line of petitioners before this Court who have challenged *Scott* on the grounds that subsequent rulings from the United States Supreme Court, among them *Reed v. Town of Gilbert*,

Ariz.,[22] *United States v. Stevens,*[23] and *United States v. Alvarez*,[24] have abrogated *Cohen*'s dictum.[25]

In *Ex parte Reece* and *Ex parte Ogle*, Presiding Judge Keller wrote in dissent to the denial of petition for discretionary review, first cautioning that the narrowing of *Scott*'s holding by Wilson v. State[26] required re-evaluation of *Scott*, and then stating that section 42.07(a)(7) could be used by the government to coerce "a more refined atmosphere" on the internet.[27] Presiding Judge's Keller's words of caution were shown

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[22] *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015).

[23] *United States v. Stevens*, 559 U.S. 450 (2010).

[24] *United States v. Alvarez*, 567 U.S. 709 (2012). An apparent exception to this line of cases is *Williams-Yulee v. Florida State Bar*. The significance of Williams-Yulee v. Florida State Bar disappears under scrutiny, which reveals that a) only four judges agreed that strict scrutiny even applied; b) the Court was not dealing with a penal statute; and c) the Court was dealing with a matter involving the honor of the judiciary. *Williams-Yulee v. Florida State Bar*, 575 U.S. 433 (2015).

[25] *See, e.g., Lebo v. State*, 474 S.W.3d 402 (Tex. App.—San Antonio 2015, pet. ref'd); *Ex parte Ogle*, No. 03-18-00207-CR, 03-18-00208-CR, 2018 WL 3637385 (Tex. App.—Austin Aug. 1, 2018), *pet. ref'd sub. nom. Ogle v. State*, 563 S.W.3d 912 (Tex. Crim. App. 2018); *Ex parte Reece*, 517 S.W.3d 108 (Tex. Crim. App. 2017).

[26] *Wilson v. State*, 448 S.W.3d 418, 420 (Tex. Crim. App. 2014).

[27] *Ex parte Reece*, 517 S.W.3d at 111 (Keller, P.J, dissenting from the denial of discretionary review).

accurate by *Ogle*, where she noted, "If this Court believed that the prosecuting authorities would never use this statute to punish criticism of agents of the government, it ought to now recognize that such a belief was overly optimistic."[28] The decisions in *Wilson*, *Reed*, *Stevens*, and *Alvarez* should guide this Court in re-evaluating *Scott* in light of the point raised above: must we continue to criminalize otherwise-lawful speech because the listener finds it distressing to hear?

Section 42.07(a)(7) is a content-based restriction.

It is, as a practical matter, impossible to know whether speech is intended to embarrass or offend someone without knowing the content of the speech.[29] Because it is necessary to look to the content of the speech at issue to decide of the speaker violated the law, section 42.07(a)(7) is a content-based restriction.[30] It is impossible to determine

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[28] *Ogle v. State*, 563 S.W.3d 912 (Keller, P.J., dissenting from the denial of discretionary review).

[29] See, for example, CR 9 (describing the content of Mr. Sanders's alleged communications: "hateful … mean … detailed").

[30] *Ex parte Lo*, 424 S.W.3d 10, 15 n.12 (Tex. Crim. App. 2013).

whether a criminal defendant intended to harass without looking at the communications' content.[31]

The statute is content based because it restricts speech based on its purpose.

> Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.[32]

Purpose is "The object toward which one strives or for which something exists; an aim or goal."[33] The *purpose* of speech (outside the case of compelled speech) is what the speaker *intends*. *Intent* is "Something that is intended; an aim or purpose."[34] "A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the

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[31] *A fortiori*, it is impossible to determine whether the defendant had the *sole intent* of harassing (and not the intent to win back the girl, or to get the government to act, or to do his job, or to get public attention for a cause) without looking at the content of the speech.

[32] *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. at 2227.

[33] *Purpose*, American Heritage Dictionary (4th ed. 2006).

[34] *Intent*, American Heritage Dictionary (4th ed. 2006).

conduct or cause the result."[35] *Purpose* and *intent* are cosynonymous with *intention*. If there is a difference between them, it is that in modern English *purpose* is more often passive (*the purpose of the speech*) and *intent* is more often active (*the speaker's intent*). But if we spoke of *the intent of the speech* or *the speaker's purpose* we would be equally understood.

On its face section 42.07(a)(7) draws distinctions based on the message a speaker conveys—some messages will offend or embarrass; others will not.

More subtly, section 42.07(a)(7) is content based and subject to strict scrutiny because it defines regulated speech by its purpose—its intent to evoke a particular emotion.

SECTION 42.07(A)(7) RESTRICTS A REAL AND SUBSTANTIAL AMOUNT OF PROTECTED SPEECH.

In *Alvarez*, the high court noted that content-based restrictions on speech such as section 42.07(a)(7) are permitted only when "confined to the few historic and traditional categories of expression long familiar to the bar."[36] The Court held in *Stevens* that "there exists no

[35] Tex. Penal Code § 6.03(a).

[36] *United States v. Alvarez*¸567 U.S. at 717, *citing United States v. Stevens*.

freewheeling authority to declare new categories of speech outside the scope of the First Amendment."[37]

The recognized historically unprotected categories of speech are:[38]

Category of Speech	Case Defining its Lack of Protection
Obscenity	*Miller v. California*, 413 U.S. 15 (1973)
Defamation	*New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)
Fraud	*Virginia Bd. Of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)
Incitement to imminent lawless action	*Brandenburg v. Ohio*, 395 U.S. 444 (1969)
Speech integral to criminal conduct	*Giboney v. Empire Storage & Ice Co.*, 363 U.S. 490 (1949)
Fighting words	*Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)
Child pornography	*New York v. Ferber*, 458 U.S. 747 (1982)
True threats	*Watts v. United States*, 394 U.S. 705 (1969)

[37] *United States v. Stevens*, 559 U.S. at 472.

[38] *See United States v. Alvarez*, 567 U.S. at 717.

Category of Speech	Case Defining its Lack of Protection
Speech presenting some grave and imminent threat the government has the power to prevent (although a restriction under this category is most difficult to sustain).	*Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931)

As "speech which invades privacy" is not one of those categories, and this Court lacks the "freewheeling authority" to define a new category of unprotected speech *sui generis*, the speech at issue under section 42.07(a)(7) must be **protected** speech. And because the restriction is content based, it is presumed unconstitutional unless it can pass the strict scrutiny analysis.[39]

Any unprotected speech that the statute captures (for example, a true threat communicated twice through electronic means) is wholly incidental to the statute, as other criminal statutes would cover that instance.[40]

[39] *See Ex parte Thompson*, 442 S.W.3d 325, 348 (Tex. Crim. App. 2014).

[40] *See* Tex. Pen. Code § 22.07 (terroristic threat); Tex. Pen Code § 22.01(a)(2) (assault by threat).

The Court below explicitly rejected the argument that section 42.07(a)(7) does not restrict speech.

One unique feature of the Seventh Court of Appeals's opinion is its explicit rejection of the State's oft-repeated canard that section 42.07(a)(7) only restricts conduct, but not speech, following *Ex parte Ingram*.[41] The State frequently argues that it is the **conduct** of sending repeated electronic communications that forms the basis of the offense, not the specific content of the communications. However, as the court below noted, *Ingram* applies to communicative conduct which is itself always illegal—soliciting a minor to engage in prohibited sexual activity—rather than section 42.07(a)(7), because it is not always a crime to engage in communicative conduct which annoys, alarms, abuses, or harasses another person.

Despite correctly rejecting the State's attempt to draw a distinction between speech and "communicative conduct," the majority in the court below held that section 42.07(a)(7) survives a facial challenge because it invades "the substantial privacy interests of the victim in an essentially intolerable manner." Absent the justification that speech

[41] *Ex parte Ingram*, 533 S.W.3d 887 (Tex. Crim. App. 2017).

which invades substantial privacy interests may be validly prohibited, then, there is no basis for finding section 42.07(a)(7) constitutional.

Privacy is not an exception to the First Amendment.

As we have seen in the discussion *supra*, the United States Supreme Court has never held that speech which invades substantial privacy interests is a category of unprotected speech. The *Cohen* Court mentions the word "privacy" three times within the body of the opinion, all on a single page of the United States Reporter.[42] In doing so, the high Court cited to *Rowan v. United States Post Office Dept. et al.*,[43] where the Court held that direct mail solicitors did not have a right to continue to send solicitations after receiving notice that such solicitations were unwelcome.[44] The Supreme Court stated that "the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate."[45] The Court held that a "mailer's right to communicate is circumscribed **only** by an affirmative act of the

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[42] *Cohen v. California*, 403 U.S. at 21.

[43] *Rowan v. United States Post Office Dept. et al.*, 397 U.S. 728 (1970).

[44] *Rowan v. United States Post Office Dept. et al.*, 397 U.S. at 736-37.

[45] *Id*. at 736.

addressee giving notice that he wishes no further mailings from that mailer."[46] Chief Justice Burger, writing for the majority, wrote that to "hold less would tend to license a form of trespass and would make hardly more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication and thus bar it entering his home."[47]

Thus, the *Cohen* Court's dicta that people in their own homes have a privacy right which can be in conflict with the right of others to communicate implicitly recognizes that the burden is on the **listener**, not the speaker, to shut herself away from unwanted communications. Like Chief Justice Burger's "offensive or boring" radio or television broadcast, the recipient of an emotionally distressing electronic communication has the same ability to "twist the dial" and shut off communication—deleting the communication, closing the web browser, using software to block the sender, or any number of filtration methods that will prevent her from receiving the unwanted communication.

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[46] *Id*. at 737 (emphasis added).

[47] *Id*.

What neither *Cohen* nor *Rowan* permit is the post-receipt criminalization of an otherwise-lawful communication. Even in *Rowan*, the high Court recognized that it was "only by an affirmative act of the addressee" that solicitors could be prohibited from using direct mailings.[48] Chief Justice Burger stated that the legislature had "erected a wall—or more accurately permit[ted] a citizen to erect a wall—that no advertiser may penetrate without his acquiescence."[49]

What differs between section 4009 in the *Rowan* case and section 42.07(a)(7) is that section 42.07(a)(7) places the burden upon the speaker, rather than the listener, to determine whether the speech is unwanted. Were the Texas Legislature to adopt a "verbal trespass" statute which prohibits communication after effective notice has been given that no more communication is warranted, then perhaps this Court would have a different situation before it.[50] However, we must address the statute as drafted by the Legislature, not the statute the

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[48] *Id.* at 737.

[49] *Id.* at 738.

[50] Such a statute might be content neutral if liability did not depend on the emotional reaction that the actor intended to evoke.

State might wish were drafted. The current version of Section 42.07(a)(7) is an improper content-based restriction on speech.

Invasion of substantial privacy interests in an essentially intolerable manner is not a sufficient basis for prohibiting speech.

Invasion of substantial privacy interests in an essentially intolerable manner has never been held to be a sufficient basis for the prohibition of speech by the United States Supreme Court, which has otherwise stated the historical categories of unprotected speech and laid down a *geas* on all lower courts against creating new categories in a "freewheeling" manner.[51] *Scott* and its progeny represent a "freewheeling" creation of a new category of unprotected speech: speech which invades a substantial privacy interest in an essentially intolerable manner.[52] The Seventh Court of Appeals begs the question

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[51] *United States v. Stevens*, 559 U.S. at 472.

[52] While *Scott* applied this rule only to invasions of the privacy of the listener, intermediate courts have extended it to invasions of the privacy of the *subject* of the speech. *See Horhn v. State*, 481 S.W.3d 363. 375 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd.) (fraudulent use of identifying information); *Ex parte Nyabwa*, 366 S.W.3d 719, 724 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd) (improper photography); *Ex parte Maddison*, 58 S.W.3d 630, 638 (Tex. App.—Waco 2017, pet. ref'd) (online impersonation). The Supreme Court in *Cohen* was not contemplating the

against Mr. Sanders: it states that Texas may forbid speech which invades a substantial privacy interest in an essentially intolerable manner because Texas has decided it may forbid speech which invades a substantial privacy interest in an essentially intolerable manner, whatever the United States Supreme Court might otherwise suggest.

Because Section 42.07(a)(7) is a content-based restriction that restricts a real and substantial amount of protected speech, the statute is facially overbroad and must be struck down regardless of the State's justification.[53] It fails the "narrow tailoring" prong of strict scrutiny regardless of the State's compelling interest.

If this Court finds that Section 42.07(a)(7) restricts only some legitimate speech, but not a real and substantial amount, then the Court must ask whether the State has a compelling interest that is being protected by the statute, and whether the statute is narrowly tailored to serve *that* interest by being no more restrictive than necessary.[54]

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effect of speech on its subject. *See Org. for a Better Austin v. Keefe*, 402 U.S. 415, 420 (1971).

[53] *State v. Johnson*, 475 S.W.3d 860, 864 (Tex. Crim. App. 2015).

[54] *Ex parte Thompson*, 442 S.W.3d at 344-45.

There is no distinction between "intentional harassment" and communication generally.

The State may try to argue that intentional harassment is not "communication" within the meaning of the First Amendment. Such an argument is specious and should be rejected.

First, the legislature calls it "communication."

Second, if the State should make this argument, the State must admit that Section 42.07(a)(7) is a content-based restriction. The argument is an attempt to sidestep the usual analysis. If the restriction is indeed content-based and the statute does not restrict a real and substantial portion of otherwise-protected speech, then the State must justify its position under a strict scrutiny analysis (see Figure 1).

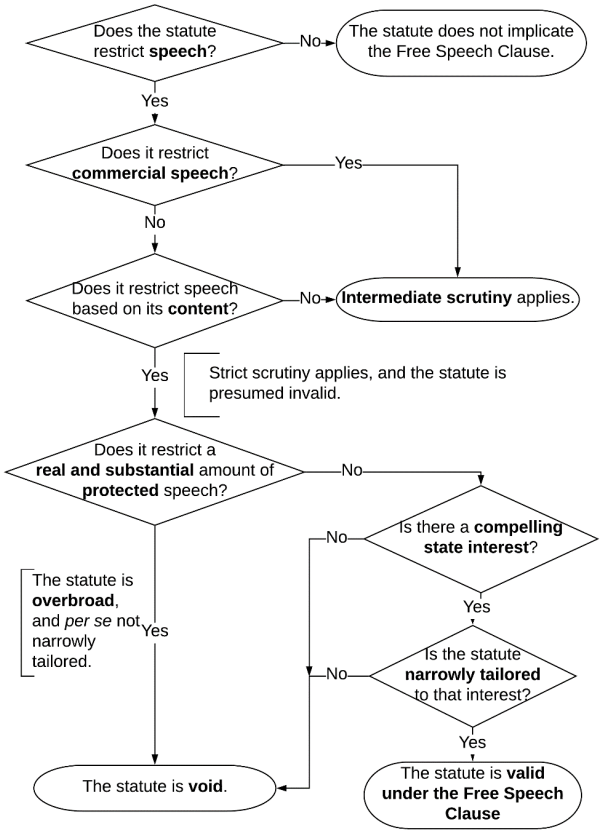

Figure 1

Strict scrutiny requires that this Court find the statute to be unconstitutional unless there is a compelling state interest served by the statute, and the statute is no more restrictive than necessary to achieve that interest.[55]

Third, should the State make this argument, it is likely that the State will also argue that section 42.07(a)(7) is akin to a reasonable time,

[55] *United States v. Alvarez*, 567 U.S. at 709; *Reed v. Town of Gilbert, Ariz.*, *135 S. Ct.* at 2218.

place, and manner restriction, since the statute only restricts electronic communications based on their annoying "manner." This argument must fail.

The method of communication is not what is criminalized under the statute; a statute that prohibited ANY electronic communication between persons would be something like a time, place, and manner restriction. Instead, the only way that section 42.07(a)(7) applies is whether the finder of fact finds the speech at issue "reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another." It is content that makes speech reasonably likely to evoke such emotional effects; it is only content that would show whether a series of posts was intended to achieve some other goal. The mere fact that electronic communications are used does not change what must be proven in order for a criminal defendant to be found guilty. In this way, section 42.07(a)(7) is unlike the telephonic harassment statute, which requires only that the telephone be made to "ring repeatedly." *See* Tex. Pen. Code Ann. § 42.07(a)(4).

Fourth, the State may attempt to argue that simply because words are used does not make a communication "speech" within the meaning of the First Amendment. The State may argue that communications

intended to cause emotional distress do not intend to communicate an idea, but rather simply wish to have an effect on the listener. This argument is fatally flawed for two reasons.

First, it is not possible to say that speech is, by virtue of its emotional intent, devoid of the intent to communicate a fact or idea.

If a speaker sends multiple e-mails to his ex-girlfriend accusing her of being unfaithful, and demeans her with a slur, we would not say that he did not intend to communicate an "idea." He very clearly intended to communicate the idea that she had wronged him by being unfaithful. We may find his actions boorish, offensive, distasteful, childish, churlish, or any number of other adjectives expressing our displeasure with his rudeness. But we cannot say that he did not mean to communicate an **idea** by his speech; obviously he did, or we could not respond in kind with our disapprobation of his chosen choice of words. If the man in our example sent an image to the ex-girlfriend without any words on it, such as her engaged in a public display of affection with another, we all readily accept that we understand the idea that he is conveying: he disapproves of her behavior and wants her to know he disapproves. Again, we may wish to take him aside and tell him that this

not how mature adults resolve their issues, but we would not say, "I have no idea what you are trying to communicate here." Every example here is "speech" within the meaning of the First Amendment; we do not ordinarily inquire into the "intent" of the speaker when determining if the First Amendment covers the expression.

More importantly, though, much speech is not intended to communicate ideas or thoughts, opinions or information, but *only* to evoke emotional effects.

Government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[56] *Message*, *ideas*, and *subject matter* are all just different aspects of the broader *content*. Another of those aspects of *content* is *emotional effect*. The evoking of an emotion is communicative content no less than conveying a fact or an idea is.

By way of example, a horror story is not intended to communicate a fact or an idea, but to frighten—to *alarm*. Pornographic erotica are not intended to communicate a fact or an idea, but to arouse.[57] Tchaikovsky

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[56] *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002).

[57] We know that the intent to arouse or gratify the emotion of sexual desire does not render speech unprotected. *Ex parte Lo*, 424 S.W.3d 10 (Tex. Crim. App. 2013).

did not write his Third Symphony to communicate some idea or thought that could be reduced to words, but only to make listeners *feel*.

"Pure speech includes written and spoken words, as well as other media such as paintings, music, and film 'that predominantly serve to express thoughts, emotions, or ideas.'"[58] Or, as Justice White wrote in 1991,

> It is only because nude dancing performances may generate emotions and feelings of eroticism and sensuality among the spectators that the State seeks to regulate such expressive activity, apparently on the assumption that creating or emphasizing such thoughts and ideas in the minds of the spectators may lead to increased prostitution and the degradation of women. But **generating thoughts, ideas, and emotions is the essence of communication**.[59]

While this was said in dissent, it cannot be gainsaid that *generating thoughts, ideas, and emotions* is the essence of communication, and conduct that is specifically intended to generate emotions—even what we might consider unpleasant or unwelcome emotions—is, by virtue of that intent, speech.

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[58] *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890 (Ariz. 2019).

[59] *Barnes v. Glen Theatre, Inc.*, 501 U.S 560, 592–93 (1991) (White, J., dissenting) (emphasis added).

The creation of an emotional state in the listener is the raison d'etre of many speech acts. Horror stories and erotica and music and dance, as well as abstract art, are protected by the First Amendment not because they present any particular topic, idea, viewpoint, or message—or anything that could be expressed in words—but because[60] they are intended to evoke emotional effects.

Section 42.07 restricts speech because of the underlying lawful intent to create an emotional state in the listener.[61]

BECAUSE NO RATIONALE SUPPORTS THE CONTINUED CRIMINALIZATION OF ELECTRONIC COMMUNICATIONS THAT HAPPEN TO OFFEND OR DISTRESS THE LISTENER, SECTION 42.07(A)(7) MUST BE STRUCK DOWN.

This Court has granted review to address the issue of whether speech that invades substantial privacy interests in an essentially intolerable manner may be prohibited consistent with the First Amendment.

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[60] And not *despite*.

[61] *See Ex parte Thompson*, 442 S.W.3d at 338 ("But when the intent is something that, if accomplished, would constitute protected expression, such an intent cannot remove from the ambit of the First Amendment conduct that is otherwise protected expression.") The only recognized category of historically unprotected speech that may depend on the intent to invoke an emotional state in someone is *true threats*. True threats are not merely speech intended to "threaten or intimidate," *cf. id.*, but speech threatening *unlawful violence*. *Virginia v. Black*, 538 U.S. 343, 360 (2003).

This Court should find that section 42.07(a)(7) is a content-based restriction on speech.[62]

This Court should also find that speech that invades substantial privacy interests in an essentially intolerable manner is not, and has never been, one of the historically unprotected categories of speech.[63]

This Court should realize that the only court which has the authority to declare a new category of unprotected speech is the United States Supreme Court.[64]

Taken together, these three propositions compel the conclusion that section 42.07(a)(7) restricts protected speech. The amount of protected speech restricted by section 42.07(a)(7) is both real and substantial judged in relation to the statute's plainly legitimate sweep.[65]

If this Court were not persuaded that *Stevens* prohibits state high courts from creating new categories of unprotected speech, then this Court would have to determine the precise boundaries of this new right

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[62] *Ex parte Lo*, 424 S.W.3d at 15, n.12.

[63] *See United States v. Alvarez*, 567 U.S. at 717.

[64] *United States v. Stevens*, 559 U.S. at 472.

[65] *Ex parte Lo*, 424 S.W.3d at 18-19.

to privacy and how it impacts the First Amendment. It is not enough to say that "speech which invades a substantial privacy interest in an essentially intolerable manner may be prohibited" without subjecting that dictum to a strict scrutiny analysis. To do so, this Court must consider whether section 42.07(a)(7), even if it has some legitimate sweep, sweeps too broadly to be borne.

Section 42.07(a)(7) does not limit itself to speech that invades substantial privacy interests in an essentially intolerable manner. For example, a reporter could not send two strongly worded e-mails with questions to a political candidate. A citizen could not send two annoying text messages to a police officer. A lawyer might find that two e-mails sent to opposing counsel became the basis for a criminal information against her. A commentator on the Facebook page of a local news channel might be disturbed by an early-morning police raid on his residence after someone took umbrage to two of his comments.

While the State might argue that what saves these hypothetical situations is the lack of intent to inflict emotional distress "for its own sake," that condition from *Scott* is not a textual part of the statute. The State is not required to allege it to arrest and prosecute, and a jury is not required to find it to convict.

Communications that harass, annoy, alarm, abuse, torment, or embarrass another are ordinarily squarely protected speech. Even if this Court were somehow to read into the statute a scienter requirement that the speaker intend to inflict emotional distress "for its own sake," speech with the intent to inflict emotional distress for the sake of emotional distress **is protected speech**; to hold otherwise would be to make a crime of every passionate argument between spouses where one says something to hurt the other, to allow the prosecution of every politician whose ads embarrass her opponents, to permit the jailing of anyone who hurts someone's feelings. [66]

Even if this Court did believe that there is enough of a plainly legitimate sweep of section 42.07(a)(7) to justify looking at the state interest justifying the restriction,[67] the State's arguments there would fail. If the plainly legitimate sweep as identified by the State is simply

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[66] And also to open the door to other sorts of speech being forbidden because the State does not like the emotional state that the speech is intended to evoke. *Cf*. *Ex parte Thompson*, 442 S.W.3d at 338 ("when the intent is something that, if accomplished, would constitute protected expression, such an intent cannot remove from the ambit of the First Amendment conduct that is otherwise protected expression.")

[67] That is, if the overbreadth were not *substantial* in relation to the statute's legitimate sweep.

the sending of an unwanted communication, as was the case in *Rowan*, then the statute can be so drafted. If the plainly legitimate sweep also includes so-called "non-communicative" messages such as non-verbal screaming or gibberish messages, then the statute should so read. So long as the statute restricts speech based on the specific words used—and it must, since it requires a judge or jury to find that the words used were "reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another"—then this statute is not narrowly tailored to achieving the governmental interest of protecting the privacy of citizens.[68]

Whether section 42.07(a)(7) is an impermissible content-based restriction failing strict scrutiny, or is overbroad, the result is the same: the First Amendment will not tolerate its continued existence.

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[68] "Overbroad" is the opposite of "narrowly tailored." A statute that is substantially overbroad must fail strict scrutiny because it is by definition not narrowly tailored. A statute that is not *substantially* overbroad may still fail strict scrutiny because it is not narrowly tailored to satisfy a compelling state interest. Protecting us from embarrassment, offense, annoyance, and other vague handwavy "harrassment" is not a compelling state interest. Even if the statute were not substantially overbroad it would fail strict scrutiny.

STATES ARE DIVIDED ON THE ISSUE OF WHETHER HARASSING SPEECH MAY CONSTITUTIONALLY BE PUNISHED.

Courts in Florida, Washington, and West Virginia have approved criminal harassment statutes that are materially distinguishable from section 42.07.[69]

The high courts of Colorado, New York, Illinois, and Minnesota have all rejected criminal-harassment statutes that required the same intent and prohibited the same actions as section 42.07.[70] Each held that the statute before it was unconstitutionally overbroad because it would sweep in a substantial amount of protected speech relative to unprotected speech or conduct.[71]

A number of state intermediate courts of appeals have also struck statutes similar to section 42.07 as unconstitutionally overbroad.[72]

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[69] *Gilbreath v. State*, 650 So. 2d 10, 12 (Fla. 1995); *State v. Dyson*, 872 P.2d 1115, 1119 (Wash. Ct. App. 1994); *State v. Thorne*, 333 S.E.2d 817, 819 (W. Va. 1985).

[70] *See* COLO. REV. STAT. § 18-9-111(1)(e) (1973); N.Y. PENAL LAW § 240.30 (2012); 38 Ill. Comp. Stat. § 26-1(a)(2) (1973); Minn. Stat. § 609.749, subd. 2(6) (2018).

[71] *See People v. Golb*, 15 N.E.3d 805, 813-14 (N.Y. 2014); *Bolles v. People*, 541 P.2d 80, 83-84 (Colo. 1975); *People v. Klick*, 362 N.E.2d 329, 331-32 (Ill. 1977); *Matter of Welfare of A.J.B.*, 929 N.W.2d 840 (Minn. 2019)

[72] *See, e.g.*, *Provo City v. Whatcott*, 1 P.3d 1113, 1115-16 (Utah Ct. App. 2000) (holding unconstitutional a statute that prohibited making phone calls "with intent to annoy, alarm another, intimidate, offend, abuse, threaten, harass, or frighten"); *City of*

Florida: Gilbreath v. State

The Florida court "narrowed the statute's scope by limiting it to telephone calls in which the caller possesses an intent to abuse, threaten or harass,"[73] rewriting the statute to excise "offend" and "annoy."[74]

This court may not "assume the legislative prerogative and rewrite a statute in order to save it."[75] Even if it could, *annoy* and *embarrass* are not the only two listed evocations of unpleasant emotions that are constitutionally protected—they are *all* protected, unless they fall into some recognized exception.[76]

The Florida statute requires that a call be made "to a location at which the person receiving the call has a reasonable expectation of

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Everett v. Moore, 683 P.2d 617, 618, 620 (Wash. Ct. App. 1984) (holding unconstitutional a municipal statute that prohibited communications "by telephone, mail or other form of written communication, in a manner likely to cause annoyance or alarm" when made "with intent to harass, annoy or alarm another person"); *State v. Dronso*, 279 N.W.2d 710, 711 n.1, 714 (Wis. Ct. App. 1979) (holding unconstitutional a statute that prohibited making a telephone call with "intent to annoy another").

[73] *Gilbreath v. State*, 650 So. 2d 10, 11 (Fla. 1995).

[74] *See id.* at 11 (quoting full language of statute).

[75] *Olvera v. State*, 806 S.W.2d 546, 552 (Tex. Crim. App. 1991).

[76] Even *alarm*—sometimes we need to alarm each other into required action (for example, repeated storm warnings to a community that should evacuate).

privacy,"[77] and section 42.07(a)(7) has no such requirement: a communication made on a public forum can violate section 42.07(a)(7).

These two factors, absent from section 42.07(a)(7), were key to the Florida court's approval of the statute: "it is the conduct of intentionally making *such* a call into *a place of expected privacy*, not pure speech, which is proscribed."[78]

Washington: State v. Dyson

The Washington statute in *State v. Dyson* likewise required a telephone call, rather than the public communications that may be prosecuted under section 42.07(a)(7). While the Washington court, like the Florida court, is wrong about communications losing protection because they are made over private channels,[79] that consideration is not even at play in this case.

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[77] *Gilbreath v. State*, 650 So. 2d at 11.

[78] *Gilbreath v. State*, 650 So. 2d at 12 (emphasis added).

[79] The Florida Court is wrong, too, about whether a telephone call is necessarily a private channel.

West Virginia: State v. Thorne

The West Virginia case of *State v. Thorne*[80] also hinged on the fact that the statute dealt only with telephone harassment.[81]

Colorado: Bolles v. People

The Colorado statute at issue in *Bolles v. People* stated that a person "commits harassment if, with intent to harass, annoy, or alarm another person, he: … (e) Communicates with a person, anonymously or otherwise, by telephone, telegraph, mail, or any other form of communication, in a manner likely to harass or cause alarm."[82] The Colorado Supreme Court examined the definitions of "annoy" and "alarm" and concluded that, under the statute, "one is guilty of the crime of harassment if he intends to 'alarm' another person—arouse to a sense of danger—and communicates to that other person in a manner likely to cause alarm."[83] Under such a statute, the court concluded, it would "be criminal in Colorado to forecast a storm, predict political

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[80] *State v. Thorne*, 333 S.E.2d at 819.

[81] *See id.* ("If people were allowed to make repeated calls for the sole purpose of harassing government employees, this would tie up the phone for those who wish to reach their government on legitimate business.")

[82] Colo. Rev. Stat. § 18-9-111(1)(e) (1973).

[83] *Bolles v. People*, 541 P.2d at 83.

trends, warn against illnesses, or discuss anything that is of any significance."[84] The statute thus swept in a substantial amount of protected speech.[85]

The Colorado court rejected *Scott*'s notion that harassment statutes are permissible when "directed only at persons who, with the specific intent to inflict emotional distress, repeatedly use the telephone to invade another's privacy and do so in a manner reasonably likely to inflict emotional distress."[86]

Declining to exalt this putative privacy interest over freedom of speech, the Colorado court stated, "we cannot, in the face of the pronouncement of the First Amendment which specifically protects the right to communicate, expand the parameters of the penumbral right to privacy, so as to prohibit communication of ideas by mail when the sender has not been requested to refrain from doing so."[87] The court

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[84] *Id.*

[85] *See id.* at 83-84.

[86] *Scott v. State*, 322 S.W.3d at 669-70; *see Bolles v. People*, 541 P.2d at 83-84.

[87] *Bolles v. People*, 541 P.2d at 83. Although the Colorado statute invalidated in *Bolles* did not require "repeated" communications, as does section 42.07(a)(4), and the court recognized the possibility that privacy of the home, "under some circumstances, is a legitimate legislative concern," 541 P.2d at 83, the Colorado court made clear that

concluded that, "if unsettling, disturbing, arousing, or annoying communications could be proscribed, or if they could only be conveyed in a manner that would not alarm, the protection of the First Amendment would be a mere shadow indeed."[88]

The Supreme Court of Colorado noted, "the crucial factor is that this statute could also be used to prosecute for communications that cannot be constitutionally proscribed."[89]

New York: People v. Golb

New York's highest court had similar concerns about that state's criminal harassment statute, which applied when a person "with intent to harass, annoy, threaten or alarm another person,… communicates with a person, anonymously or otherwise, by telephone, by telegraph, or by mail, or by transmitting or delivering any other form of written communication, in a manner likely to cause annoyance or alarm."[90]

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those limited circumstances would need to turn on conduct and not communication of an annoying or alarming message. *See id*. at 83-84 (providing examples of a commercial solicitor appearing in person at one's door or "the merciless blare" of a soundtruck).

[88] *Id*. at 83.

[89] *Id*. *at* 80.

[90] N.Y. PENAL LAW § 240.30(1)(a) (2012).

That court determined that this language covered substantial amounts of protected speech.[91] Indeed, "'no fair reading' of this statute's 'unqualified terms supports or even suggests the constitutionally necessary limitations on its scope.'"[92]

The New York court's opinion, like that of the Colorado court in *Bolles*, did not depend on the fact that the statute included forms of communication other than telephonic. The reasoning of those two cases applies equally to telephonic communication, email, and Facebook posts.

Illinois: People v. Klick

Although Illinois's harassment statute[93] did not use words identical to those in Texas Penal Code section 42.07, the Illinois Supreme Court determined that the statute would cover the same speech criminalized by the Texas, Colorado, and New York statutes: speech intended to

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[91] *People v. Golb*, 15 N.E.3d at 813-14.

[92] *Id.* at 813.

[93] 38 Ill. Comp. Stat. § 26-1(a)(2) (1973)

annoy the recipient that does not fall into any accepted category of unprotected speech (such as true threats or obscenity[94]).[95]

The Illinois statute provided that it was an offense to "knowingly … [w]ith intent to annoy another, make[] a telephone call, whether or not conversation thereby ensues."[96] The court concluded that the statute was unconstitutionally overbroad, observing that "First Amendment protection is not limited to amiable communications."[97]

Like the Colorado court in *Bolles*, the Illinois court considered the argument that "one's right to communicate must be balanced against another's right to privacy in his home."[98] It rejected the argument on

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[94] Section 42.07(a)(1) is not restricted to obscenity either. *Please see* above at 24.

[95] *See People v. Klick*, 362 N.E.2d 329, 331-32 (Ill. 1977).

[96] 38 Ill. Comp. Stat. § 26-1(a)(2) (1973).

[97] *People v. Klick*, 362 N.E.2d. at 332. The Illinois Supreme Court upheld a later version of the statute enacted in response to *Klick* that removed "annoy" from the list of possible intents for making a telephone call. *See People v. Parkins*, 396 N.E.2d 22, 23-24 (Ill. 1979) (considering revised language criminalizing "[m]aking a telephone call, whether or not conversation ensues, with intent to abuse, threaten or harass any person at the called number"), *appeal dismissed*, 446 U.S. 901 (1980). The court stated that, as amended, "the words 'abuse' and 'harass' take color from the word 'threaten' and acquire more restricted meanings"; therefore, the statute was not overbroad. *Id.* at 24.

[98] *People v. Klick*, 362 N.E.2d at 332; *see also Bolles v. People*, 541 P.2d at 83-84.

two grounds. First, the statute was not limited to phone calls made to a home.[99] Second, the statute was "not limited to only conduct which might be deemed 'intolerable.'"[100] Both of these grounds also apply to Texas Penal Code section 42.07(a)(7).

Minnesota: Matter of Welfare of A.J.B.

In a July 2019 opinion, the Minnesota Supreme Court considered and rejected conduct-centric arguments like those urged by the State here.[101]

Although Minnesota's statute was expressly framed in terms of conduct, and arguably covered less protected speech than section 42.07(a)(1),[102] the court nonetheless held it unconstitutionally overbroad.[103]

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[99] People v. *Klick*, 362 N.E.2d at 332.

[100] *Id.* "The legislature cannot abridge one's first amendment freedoms merely to avoid slight annoyances caused to others." *Id.*

[101] *Matter of Welfare of A.J.B.*, 929 N.W.2d 840 at 852, 859 (Minn. 2019.

[102] See *Id.* at 849 (containing language of statute). The Minnesota statute's mens rea requirement differs slightly from section 42.07(a)(1)'s, allowing a conviction when the actor "has reason to know" of the specified harm (whereas Texas requires intent), but also requiring actual harm (which Texas does not require). Regardless, the court held that Minnesota's statute would be unconstitutionally overbroad even if it required actual knowledge that the specified harm would ensue. *Id.* at 857.

[103] *See id.* at 857.

Although the Minnesota stalking-by-mail statute explicitly addressed "conduct," that conduct was "tethered closely" to expression.[104]

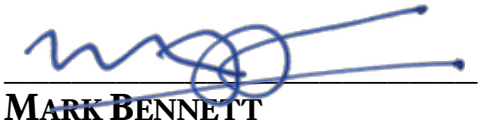
Conclusion and Prayer

For all of these reasons, the statute at issue, Texas Penal Code § 42.07(a)(7), is overbroad, chills speech, fails strict scrutiny, and infringes upon the right of all Americans to free expression. It must be struck down as void *ab initio*, and the trial court must be instructed to dismiss the complaint and information against Mr. Sanders.

[104] *Matter of Welfare of A.J.B.*, 929 N.W.2d at 851. Section 42.07 makes no bones about what it restricts: *communications*.

Respectfully submitted,

Bennett & Bennett, Lawyers
By:



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief was served on all parties and counsel of record as required by the Texas

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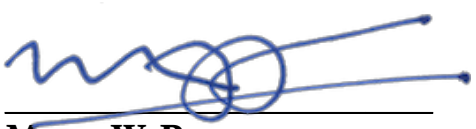

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